

1992

A Judicial Role for Proceedings Involving Uncontested Modifications to Existing Consent Decrees

Justin Weaver Lilley

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Justin W. Lilley, *A Judicial Role for Proceedings Involving Uncontested Modifications to Existing Consent Decrees*, 41 Cath. U. L. Rev. 665 (1992).

Available at: <https://scholarship.law.edu/lawreview/vol41/iss3/5>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

COMMENTS

A JUDICIAL ROLE FOR PROCEEDINGS INVOLVING UNCONTESTED MODIFICATIONS TO EXISTING CONSENT DECREES

In administering the nation's antitrust laws,¹ the United States Department of Justice² frequently brings civil and criminal actions against companies, or perhaps entire industries, that have allegedly engaged in illegal conduct. Most antitrust cases initiated by the Department of Justice are ultimately disposed of through consent decrees³ because antitrust litigation can be very expensive and time consuming.⁴ Since its passage in 1974, the Antitrust Procedures and Penalties Act⁵ (APPA), or the Tunney Act,⁶ has

1. The most commonly employed antitrust statutes are the Sherman Act, 15 U.S.C. §§ 1-7 (1988), and the Clayton Act, 15 U.S.C. §§ 12-27 (1988). Congress enacted the Sherman Act in 1890 as a general prohibition against agreements and monopolies, or attempts to monopolize, in restraint of trade. The Clayton Act was enacted in 1914 as an amendment to the Sherman Act. The Clayton Act prohibits specific types of conduct, such as price discrimination, mergers, and tying arrangements, that would impede competition.

2. The Federal Trade Commission Act, 15 U.S.C. §§ 41-51 (1988), passed one month prior to the Clayton Act in 1914, creates a general prohibition against unfair methods of competition and permits the Federal Trade Commission to bring civil antitrust actions.

3. Antitrust consent decrees are defined generally as "an order of the court agreed upon by representatives of the Attorney General and of the defendant, without trial of the conduct challenged by the Attorney General." ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPARTMENT OF JUSTICE ix (1959) [hereinafter 1959 REPORT].

In 1959, the House Judiciary Committee's Antitrust Subcommittee stated that "3 out of every 4 of the antitrust cases in equity that the Attorney General has started have ended by consent, with no issue litigated and adjudicated." *Id.* The House Judiciary Committee subsequently wrote that between 1955 and 1972, "approximately 80 percent of antitrust complaints filed by the Antitrust Division of the Department of Justice [were] terminated by pre-trial settlement; in two years during the 1955-1972 period, 100 percent of all judgments in public antitrust cases resulted from utilization of the consent decree process." H.R. REP. NO. 1463, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6536 [hereinafter HOUSE REPORT]; see also II PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 330a n.1 (1978).

4. See generally II AREEDA & TURNER, *supra* note 3, ¶ 330.

5. 15 U.S.C. § 16(b)-(h).

6. "Tunney Act" and "APPA" are used interchangeably throughout this Comment.

governed both the procedures⁷ by which parties to a decree submit the proposed settlement to the court and the substantive standard⁸ courts apply in considering the decree. Despite the frequency with which existing consent decrees are modified, however, the Tunney Act does not apply to modification proceedings.

This absence of a congressional mandate leaves the Department of Justice, and more importantly the courts, to fill the statutory void in modification proceedings. Most district courts deny a request to modify an existing consent decree if the other party opposes the proposed modification.⁹ However,

7. *Id.* § 16(b)-(d), (g).

8. *Id.* § 16(e)-(f).

9. When the government opposes the modification, courts almost unanimously apply a very strict standard in deciding whether to grant the defendant's request. The Supreme Court of the United States established this stringent standard in *United States v. Swift & Co.*, 286 U.S. 106 (1932). In *Swift*, the government and the five leading meat-packing companies in the United States entered into a consent decree in 1920 that enjoined the meat-packers from selling meat at the retail level and from entering any other food-related businesses at either the retail or wholesale levels. *Id.* at 111. Ten years later, despite the government's opposition, the defendants challenged the decree on the grounds that "conditions in the packing industry and in the sale of groceries and other foods had been transformed so completely that the restraints of the injunction, however appropriate and just in . . . 1920, were now useless and oppressive." *Id.* at 113. The Court denied the defendant's request, stating that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Id.* at 119.

For an isolated case refusing to follow *Swift*, see *United States v. Continental Can Co.*, 128 F. Supp. 932 (N.D. Cal. 1955) (holding that a defendant-sought modification that the government opposed should be granted so long as the modification is consistent with the aims of the decree). One commentator has concluded that *Continental Can* was "an aberration" because "[t]he court did not even cite *Swift*." William M. Kelly, Note, *Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 COLUM. L. REV. 296, 305 n.85 (1977).

Some confusion exists as to how strict the court's standard of review should be when the defendant opposes the modification. In *Chrysler Corp. v. United States*, 316 U.S. 556 (1942), the government sought to modify a two-year old consent decree that extended a provision prohibiting both Chrysler and Ford Motor Company from affiliating with any consumer financing company. *Id.* at 558-60. Though Chrysler opposed the modification, the Court granted the government's request. *Id.* at 564. In so doing, the Court reasoned that the appropriate standard was "whether the change served to effectuate or to thwart the basic purpose of the original consent decree." *Id.* at 562. Thus, *Chrysler* suggests that while a defendant's proposed modification that is opposed by the government must be accompanied by some type of "grievous wrong," *Swift*, 286 U.S. at 119, a government-sought modification that is opposed by the defendant will be granted so long as it serves the basic purpose of the original decree. *Chrysler*, 316 U.S. at 562; see also *Liquid Carbonics Corp. v. United States*, 350 U.S. 869 (1955); *Hughes v. United States*, 342 U.S. 353 (1952).

Some commentators, however, believe that the liberalized standard laid down in *Chrysler* was effectively overruled in *Ford Motor Co. v. United States*, 335 U.S. 303 (1948). See, e.g., John D. Anderson, Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 MICH. L. REV. 134, 143 (1985). In *Ford*, the Court denied the government's request to extend the same provision at issue in *Chrysler*. The Court ruled that the government's "mechanical

in cases where the government and defendant agree to the proposed modification, courts generally apply a deferential standard of review.¹⁰ A notable exception is the American Telephone and Telegraph (AT&T) decree court, which in 1987 denied an uncontested modification¹¹ to the 1982 consent decree¹² that divested AT&T of its control and ownership of local telephone companies.

The AT&T decree court's denial of the uncontested modification and the United States Court of Appeals for the District of Columbia Circuit's subsequent reversal of that decision raise an important issue concerning district courts' function in considering uncontested modifications to existing consent decrees. While most courts view their role in determining the public interest as a limited one,¹³ the AT&T decree court took an expansive view of its role in assessing the government's decision to enter into¹⁴ and subsequently mod-

application" of *Chrysler* was misguided since "circumstances that were found extenuating on behalf of the Government two years after the entry of the decree are hardly compelling ten years afterward." *Ford*, 335 U.S. at 321. In effect, the Court seemed to be implying that contrary to *Chrysler*, the government must also demonstrate the type of "grievous wrong" enunciated in *Swift*. Thus, "whatever liberalization one reads into *Chrysler* must be largely read out of *Ford* six years later." Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303, 1313 (1967). The Court recently stated that the *Swift* "grievous wrong" standard does not apply to consent decrees arising out of institutional reform litigation, such as school desegregation and prison reform cases. See *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 764-65 (1992); *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1991). Unlike consent decrees arising out of antitrust litigation, institutional reform decrees displace local decisionmakers, thereby disturbing "the allocation of powers within our federal system." *Rufo*, 112 S. Ct. at 764 (quoting *Dowell*, 111 S. Ct. at 637). According to the Court, once the constitutional violation that the decree addresses has been remedied, district courts should defer to local decisionmakers' expertise in solving problems of institutional reform. *Id.* Thus, when considering a request to modify a decree, district courts should avoid using the *Swift* standard, regardless of whether the other party opposes the modification. Instead, courts should apply a more "flexible standard" and approve modifications if the moving party "establish[es] that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Id.* at 765. While *Rufo* and *Dowell* may prompt many local governments to petition for relief from decrees, see Bruce Fein, *Loosening the Ties of Consent Decrees*, LEGAL TIMES, February 3, 1992, at 22, the decisions do not replace the *Swift* standard as the appropriate test for considering contested modifications to antitrust consent decrees.

10. See *infra* notes 68-70 and accompanying text.

11. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 562-67 (D.D.C. 1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

12. *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Given the continual reference throughout this Comment to Judge Greene's AT&T decision and *Western Electric* decision, this Comment will refer to those decisions as being written by the "AT&T decree court."

13. See *infra* notes 67-69 and accompanying text.

14. *AT&T*, 552 F. Supp. at 131.

ify¹⁵ the consent decree. The AT&T decree court's thorough standard of review raises constitutional and practical concerns¹⁶ that bring into focus the need for a uniform standard for reviewing uncontested modifications.

This Comment first examines the APPA and the concerns that motivated its enactment.¹⁷ Though the Tunney Act does not apply to modification proceedings, this Comment demonstrates that most district courts borrow the APPA's procedural and substantive components in considering modifications to existing consent decrees.¹⁸ This Comment then analyzes the concerns arising out of the AT&T decree court's standard of review to demonstrate that the court's standard possibly is unconstitutional and jeopardizes the viability of consent decrees as an alternative to litigation.¹⁹ This Comment concludes with a proposal for reviewing uncontested modifications that protects the "public interest" while preserving the attractiveness of consent decrees as an antitrust enforcement mechanism.²⁰

I. UNCONTESTED MODIFICATION PROCEEDINGS: THE JUDICIAL ROLE IN THE ABSENCE OF LEGISLATIVE GUIDANCE

A. *The Tunney Act*

Prior to enactment of the Tunney Act, statutory reference to antitrust consent decrees was limited to section 5(a) of the Clayton Act.²¹ Section 5(a) stipulates that consent decrees entered into "before any testimony has been taken" cannot be used as evidence against the defendant in any future civil or criminal proceedings.²² This provision preserves antitrust defendants' incentive to enter into consent decrees with the government,²³ thereby allowing the Department of Justice more effectively to allocate its resources in administering antitrust laws.²⁴

15. *Western Elec.*, 673 F. Supp. at 562-67.

16. See *infra* notes 161-96 and accompanying text.

17. See *infra* notes 21-54 and accompanying text.

18. See *infra* notes 62-67 and accompanying text.

19. See *infra* notes 161-96 and accompanying text.

20. See *infra* notes 197-226 and accompanying text.

21. 15 U.S.C. § 16(a) (1988).

22. *Id.*

23. In fact, § 5(a) of the Clayton Act is the reason that consent decrees are used with such frequency in civil antitrust actions. 1959 REPORT, *supra* note 3, at ix; see also *supra* note 3.

24. In its report accompanying the Tunney Act, the Senate wrote that "the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere." S. REP. NO. 298, 93d Cong., 1st Sess. 5 (1973) [hereinafter SENATE REPORT]. In 1971, the Supreme Court stated that consent decrees "normally embod[y] a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).

The Tunney Act was enacted in 1974 in response to criticism of the consent decree process dating back to 1955.²⁵ In the mid-1950's, the government and the defendant typically would submit the proposed decree to the district court, which then would enter the decree after a cursory examination and without the benefit of public comment.²⁶ In its 1959 report on the Department of Justice's consent decree program, the House Judiciary Committee's Antitrust Subcommittee voiced several concerns with the consent decree program, including misgivings that the judiciary was effectively "eliminated" from the process, that the process was cloaked in too much secrecy, and that the process "amounted to a compromise of the Government's interest."²⁷

In response to the report's recommendation that the process include input from the judiciary and the public,²⁸ the Department of Justice issued regulations in 1961 that established a minimum thirty-day waiting period between the parties' consent to the decree and the court's official approval of it.²⁹ During this period the public could view the proposed decree and "state comments, views or relevant allegations prior to the entry" of the decree.³⁰ The purpose of the thirty-day comment period was "to minimize secrecy and insure that consent decrees were in the public interest."³¹

In the early 1970's, however, the Justice Department's settlement of three different antitrust suits with the International Telephone and Telegraph Corporation (ITT)³² rekindled Congressional dissatisfaction with the govern-

25. 1959 REPORT, *supra* note 3, at x.

26. *Id.* For a lengthier analysis of the consent decree process prior to the Tunney Act and the negligible role the judiciary played, see Clark E. Walter, Comment, *Consent Decrees and the Judicial Function*, 20 CATH. U. L. REV. 312, 315-16, 320-23, 326-27 (1970).

27. 1959 REPORT, *supra* note 3, at x. For the purposes of analyzing problems with the consent decree program at that time, the Subcommittee report focused on two consent decrees that the government had entered. First, the report examined the process by which the government entered into the 1956 consent decree with AT&T and concluded that the decree was "devoid of merit and ineffective as an instrument to accomplish the purposes of the antitrust laws." *Id.* at 290; see also Celillianne Green, Comment, *The 1982 AT&T Consent Decree—Strengthening the Antitrust Procedures and Penalties Act*, 27 HOW. L.J. 1611, 1619-26 (1984). Second, the report looked into the negotiations surrounding both the entry into and the administration of the oil pipeline industry consent decree. The report concluded that the oil pipeline decree "illustrates the inherent danger that consent settlement procedures may nullify the Government's antitrust policies and objectives, and protect defendants in the continuation of activities originally challenged by the Attorney General." 1959 REPORT, *supra* note 3, at 294.

28. 1959 REPORT, *supra* note 3, at 304.

29. 28 C.F.R. § 50.1 (1970).

30. *Id.* § 50.1(a).

31. Janet L. McDavid et al., *Antitrust Consent Decrees: Ten Years of Experience Under the Tunney Act*, 52 ANTITRUST L.J. 883, 885 (1983).

32. *United States v. International Tel. & Tel. Corp. (ITT)*, 1971 Trade Cas. (CCH) ¶ 73,665 (D. Conn. 1971); *United States v. International Tel. & Tel. Corp. (ITT)*, 1971 Trade

ment's consent decree program. The decrees afforded the government much less relief than it had sought in the original complaints,³³ causing some observers to allege that the decrees were settled for political reasons unrelated to the public interest.³⁴ The "public suspicion"³⁵ surrounding the ITT consent decrees provided Congress with the "catalyst"³⁶ for passing the Tunney Act. The APPA, consequently, imposes obligations on the government, defendants, and courts to ensure that courts are "an independent force rather than a rubber stamp in reviewing consent decrees."³⁷

Under the APPA, the government and defendants must file the proposed consent decree with the court at least sixty days before the decree's effective date, along with a competitive impact statement (CIS) prepared by the government that explains the reasons for the decree and its details.³⁸ In addition, the government is required to publish the proposed decree and CIS in the *Federal Register*.³⁹

The government has two additional obligations. First, the APPA requires the government, at least sixty days prior to the proposed decree's effective date, to publish in various newspapers summaries of the proposed decree and CIS.⁴⁰ Second, the Tunney Act requires the Attorney General to estab-

Cas. (CCH) ¶ 73,666 (D. Conn. 1971); *United States v. International Tel. & Tel. Corp.*, 1971 Trade Cas. (CCH) ¶ 73,667 (N.D. Ill. 1971). The suits involved ITT's existing mergers with Canteen Corporation and ITT's proposed mergers with Grinnell Corporation and Hartford Fire Insurance Company.

33. *McDavid et al.*, *supra* note 31, at 885 & n.12 (pointing out that, though the government's suit sought divestiture of Canteen, Grinnell, and Hartford Fire, the consent decree required ITT to divest ownership only in Canteen and Grinnell but not Hartford Fire and to disgorge the profits earned between the acquisition and the eventual divestiture).

34. Specifically, one commentator has speculated that the Department of Justice settled the cases in return for allowing ITT to help finance the 1972 Republican National Convention in Miami, Florida. See Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 593, 603-06 (1973); see also *Hearings on the Nomination of Richard G. Kleindienst to be Attorney General Before the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 284 (1972).

35. *Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947, and S. 782 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 38 (1973) [hereinafter *House Hearings*] (statement of Sen. Tunney).

36. *Id.* at 36 (statement of Rep. Rodino).

37. *Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1 (1973) [hereinafter *Senate Hearings*] (statement of Sen. Tunney).

38. 15 U.S.C. § 16(b).

39. *Id.* The *Federal Register* is a daily government publication commonly used by federal agencies to announce proposed changes to rules and regulations. Agencies typically invite the public to submit comments on the proposals. At the close of the comment period, finalized changes are printed in the *Federal Register* and appear in the *Code of Federal Regulations*. See BLACK'S LAW DICTIONARY 612 (6th ed. 1990).

40. 15 U.S.C. § 16(c).

lish a comment period⁴¹ following initial publication of the proposed decree. The Attorney General is required to respond to the comments and publish the responses in the *Federal Register*.⁴²

Beyond the obligation to file the proposed consent decree with the court,⁴³ defendants have only one other obligation under the APPA. Within ten days of filing the proposed decree, defendants must file with the court a description of "any and all written or oral communications" they have had with the government that are relevant to the proposal.⁴⁴

The courts' obligation under the Tunney Act is to determine whether the proposed consent decree "is in the public interest"⁴⁵ rather than to engage in "judicial rubber stamping," which legislators felt previously had been the case.⁴⁶ Though "public interest" is not defined by the Act, courts may consider the impact the proposed decree would have "upon the public generally."⁴⁷ In making their public interest determination, courts also may invoke the APPA's procedural mechanisms, such as conducting a hearing or appointing a special master.⁴⁸

While the Tunney Act applies to proposed consent decrees that have been filed with the court,⁴⁹ it is silent regarding the establishment of procedural and substantive standards for modifying existing consent decrees. The APPA's references to modifications of consent decrees⁵⁰ "relate[] only to

41. The comment period under the Tunney Act lasts for the entire sixty-day period in which the proposed decree lies before the district court. *Id.* § 16(d). During that period, the public is invited to submit comments to the government regarding the proposed decree. Most comments come from private parties who will be affected, either adversely or beneficially, by the decree.

42. *Id.*

43. *Id.* § 16(b).

44. *Id.* § 16(g).

45. *Id.* § 16(e).

46. HOUSE REPORT, *supra* note 3, at 8.

47. 15 U.S.C. § 16(e).

48. *Id.* § 16(f). A special master is "[a] master appointed to act as the representative of the court in some particular act or transaction, as, to make a sale of property under a decree." BLACK'S LAW DICTIONARY 975 (6th ed. 1990). Under the Tunney Act, district court judges, in making their public interest determinations, may choose to appoint a special master to aid the court in understanding the complexities of an industry or company that the government is suing. 15 U.S.C. § 16(f)(2).

The final provision of the Tunney Act stipulates that neither the CIS nor the public interest proceedings can be used against any defendants. *Id.* § 16(h). For a more detailed analysis of the APPA's provisions, see Eric J. Branfman, *Antitrust Consent Decrees—A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act*, 27 ANTITRUST BULL. 303, 306-27 (1982).

49. 15 U.S.C. § 16(b).

50. *Id.* § 16(b)(5), (e)(1).

modification of the proposal,"⁵¹ and not to the final decree. If Congress had intended the statute to cover modification proceedings, then presumably such standards would have been included in the provisions that outline the courts' public interest obligations under the APPA.⁵²

The APPA's legislative history also is silent on the issue of modification proceedings. The report of the House Judiciary Committee stated that the APPA "is designed to . . . regularize and make uniform judicial and public procedures that *depend upon the Justice Department's decision to enter into a proposal for a consent decree*."⁵³ Similarly, the Senate Judiciary Committee concluded in its report that the APPA "provides that the district court shall make an independent determination as to whether or not *the entry of a proposed consent decree is in the public interest* as expressed by the antitrust laws."⁵⁴ Neither report refers to the standard of review courts should employ when modifying existing consent decrees.

B. Modification Proceedings: Relying on the Tunney Act

Though the APPA does not on its face apply to modification proceedings, many district courts have relied on its procedural and substantive elements when considering such modifications.⁵⁵ In fact, one court has expressly held that the Tunney Act applies to the modification of existing consent decrees. In *United States v. Motor Vehicle Manufacturers Association*,⁵⁶ Judge Curtis of the United States District Court of the Central District of California required the parties to comply with the Tunney Act before extending a 1969 consent decree, which prohibited automobile manufacturers from collaborating on manufacturing pollution control devices.⁵⁷ The court, however, did not explain its reasoning; it simply stated that the APPA applied and ordered compliance.⁵⁸

One other court has followed the *Motor Vehicle* decision. In its opinion approving the 1982 AT&T consent decree,⁵⁹ the AT&T decree court concluded that the Tunney Act applied to modifications of consent decrees.⁶⁰

51. Kelly, *supra* note 9, at 308 n.110.

52. 15 U.S.C. § 16(e), (f).

53. HOUSE REPORT, *supra* note 3, at 6-7 (emphasis added).

54. SENATE REPORT, *supra* note 24, at 5 (emphasis added).

55. See *infra* notes 64-67 and accompanying text.

56. 1981-2 Trade Cas. (CCH) ¶ 64,370 (C.D. Cal. 1981).

57. *Id.* at 74,704.

58. *Id.*

59. *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

60. The original AT&T consent decree was the product of a government suit which began in 1949 but was settled in 1956 in the United States District Court for the District of New

Specifically, the court indicated that the APPA applies to proposed consent decrees and to modifications of existing decrees. It held that "[t]he standards are the same whether the [proposed consent decree] is regarded as 'new' or as a modification of the 1956 decree in the *Western Electric* action."⁶¹

With the exception of the *Motor Vehicle* and AT&T decree courts, however, district courts have been largely unwilling to apply the APPA to any type of modification proceedings, regardless of whether the motion is uncon-

Jersey. *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956). In 1974, the government brought suit against AT&T in the United States District Court for the District of Columbia but settled the case in 1982. The parties submitted the proposed settlement as a modification to the 1956 consent decree. The United States District Court for the District of New Jersey approved the modifications to the 1956 consent decree. *United States v. Western Elec. Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,454, at 72,548 (D.N.J.), *vacated sub nom.* *United States v. American Tel. & Tel. Co. (AT&T)*, 1982-1 Trade Cas. (CCH) ¶ 64,476 (D.D.C. 1982). In considering the requested modifications, the court did not apply the Tunney Act but concluded that the modification to the 1956 decree was "in the general public interest." *Id.* at 72,548.

The court then transferred the case to the United States District Court for the District of Columbia since "Judge Greene's intimate familiarity with the details of the trial . . . will better equip him to deal with the transition" of AT&T's reorganization pursuant to the modified consent decree. *Id.* At that point, the parties intended to "proceed with the *functional equivalent of a Tunney Act proceeding* in order to permit all interested persons an opportunity to file comments." *United States v. American Tel. & Tel. Co. (AT&T)*, 1982-1 Trade Cas. (CCH) ¶ 64,465, at 72,604 (D.D.C. 1982) (statement of Gerald A. Connell, counsel for the government) (emphasis added). Both parties believed that since the settlement was a modification to the 1956 consent decree, strict compliance with the Tunney Act was not necessary. Instead, the parties argued that Judge Greene, upon transfer of the case, "would have the inherent equitable powers fully equivalent to the power under the Tunney Act to find that proposed modification of that decree either in the public interest or not, and to dispose of it in accordance with that determination." *Id.*

Judge Greene, however, preferred that the settlement be viewed as a proposed consent decree settling the case in his court, *id.* at 72,605, wherein the Tunney Act would apply to the proceedings. Judge Greene believed that he had to

make certain that the Tunney Act is applied and that the public interest determination on relief agreed to on this case is also applied This case is too important to the judicial process, to the parties, and to the country to have it concluded on a haphazard basis and without the public exposure mandated by the Congress.

Id. at 72,611-12 (statement of Judge Greene). Judge Greene ordered that both the dismissal and the modification to the 1956 consent decree be vacated and that both the 1949 suit against Western Electric, which led to the 1956 decree, and the 1974 suit against AT&T be consolidated. *United States v. American Tel. & Tel. Co. (AT&T)*, 1982-1 Trade Cas. (CCH) ¶ 64,476, at 72,658-60 (D.D.C. 1982). In addition, since both parties agreed not to litigate the issue of whether the Tunney Act should apply to the proceedings before Judge Greene, the court concluded that "it is [not] necessary to render a decision on the technical applicability of the Act." *Id.* at 72,657 n.3. Judge Greene nevertheless ordered the parties to comply with the Tunney Act for purposes of considering the proposed consent decree between the government and AT&T. *Id.* at 72,612.

61. *AT&T*, 552 F. Supp. at 147 n.67.

tested.⁶² Commentators also are in general agreement that the Tunney Act does not apply to modifications of existing consent decrees.⁶³ Nonetheless, while district courts have not applied the APPA in uncontested modification proceedings, they have not ignored it either. In *United States v. American Cyanamid Co.*,⁶⁴ the United States Court of Appeals for the Second Circuit advised that the Tunney Act "provides useful guidance to the courts in deciding how modification procedures should be addressed."⁶⁵

Most district courts have taken the *American Cyanamid* court's advice. In many cases since the passage of the APPA, courts have employed the public interest language found in the APPA and required the parties to provide APPA-type notice of the proposed modifications and an opportunity for public comment.⁶⁶ Some courts have gone further to require that the gov-

62. However, one court concluded that the public interest determination in considering whether to terminate a consent decree by mutual consent "is the same standard that a district court applies in deciding whether to enter an initial consent decree submitted by the government in an antitrust proceeding." *United States v. Columbia Artists Management, Inc.*, 662 F. Supp. 865, 869 (S.D.N.Y. 1987). Interestingly, the court cited footnote 67 in Judge Greene's decision approving the AT&T consent decree as authority for the proposition that the APPA's standards apply to termination of consent decrees. See *AT&T*, 552 F. Supp. at 147 n.67. One could argue that if the APPA logically applies to both the entry and termination of consent decrees, it should necessarily apply to any intermediate proceedings (i.e., modifications to consent decrees).

63. For example, one commentator insisted:

The fact that Congress addressed the issue of modifications but chose not to mention them in the Act is persuasive evidence that Congress did not intend to bring modifications under the APPA. *Motor Vehicle's* (and perhaps *AT&T's*) extension of the APPA to modifications is therefore not supported by either the wording of the statute or the relevant legislative history.

Anderson, *supra* note 9, at 140-41; see also *Green*, *supra* note 27, at 1632.

64. 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

65. *Id.* at 565 n.7. The D.C. Circuit Court of Appeals also has concluded that the Tunney Act should apply to modifications of consent decrees. *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990). On appeal from Judge Greene's decision to maintain the MFJ's core restrictions, the D.C. Circuit stated that "uncontested motions for modification . . . should be approved so long as the modifications satisfy the 'public interest' standard embodied in the Tunney Act." *Id.* at 295; see also Morris E. Lasker, *The Tunney Act Revisited: The Role of the Court*, 52 ANTITRUST L.J. 937, 939 (1983) (stating that, for practical purposes, "there is no reason to believe that [the APPA] does not apply as much to the consent modification of a decree, as to the framing of the original decree").

66. See *United States v. Parker Hannifin Corp.*, 1986-1 Trade Cas. (CCH) ¶ 67,066 (N.D. Ohio 1985) (requiring public notice and an opportunity for public comment); *United States v. Waste Management, Inc.*, 1986-1 Trade Cas. (CCH) ¶ 67,151 (D.Col. 1986) (same); *United States v. Radio Corp. of Am.*, 1988-2 Trade Cas. (CCH) ¶ 68,275 (S.D.N.Y. 1985) (same); *United States v. First Nat'l Supermarkets, Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,721 (N.D. Ohio 1987) (same).

In several post-APPA enactment cases, courts have approved uncontested modifications without requiring notice or mentioning that the modifications were in the public interest. See *United States v. Paramount Pictures, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,378 (S.D.N.Y.

ernment provide supporting evidence or proof of its conclusion that the proposed uncontested modifications are in the public interest.⁶⁷

In each case, regardless of the burden placed on the parties, district courts approved the parties' proposed modifications, generally noting that the government should be accorded a certain amount of deference in making public interest determinations.⁶⁸ One court concluded that "the Attorney General is the representative of the public interest in antitrust cases brought by the government, and that the 'government is in a better position to determine what serves the public interest best.'"⁶⁹ Consequently, district courts generally view their role in considering uncontested modifications as limited: their analysis is limited to ensuring that proposed modifications are in the public interest and that the government has not engaged in bad faith or malfeasance.⁷⁰

A minority of district courts, however, prefer a slightly more expansive role in consent decree modifications. In an uncontested modification to a decree⁷¹ that was considered after enactment of the APPA, the United States District Court for the Northern District of Illinois articulated a more expansive judicial role than have other district courts.⁷² Specifically, the court established a procedure to allow for public participation that also accords some deference to the parties in agreement.⁷³ In cases involving consented-to modifications, the 1975 *Swift* court stated, "the court is empowered to implement a procedure designed to produce, in the public inter-

1974); *United States v. Libbey-Owens-Ford Glass Co.*, 1974-2 Trade Cas. (CCH) ¶ 75,141 (N.D. Ohio 1974); *United States v. United Fruit Co.*, 1978-1 Trade Cas. (CCH) ¶ 62,001 (E.D. La. 1978); *United States v. Hartford-Empire Co.*, 1978-1 Trade Cas. (CCH) ¶ 62,057 (N.D. Ohio 1976); *United States v. Swift & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,185 (N.D. Ill. 1980).

67. See *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,706 (N.D. Ill. 1975) (requiring the parties to place on the record reasons in support of the proposed modification since "[t]he Government has the continuing obligation to insure the pro-competitive effects of the modification"); *United States v. National Fin. Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D. Mich. 1985) (asking the government to provide a "reasoned determination" that the proposed modification will "serve the public interest"); *United States v. Yoder Bros., Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,793 (N.D. Ohio 1986) (requesting "the government to file evidentiary proof in support of its conclusion that 'the proposed modifications would not harm competition in the chrysanthemum industry'").

68. See *Swift*, 1975-1 Trade Cas. (CCH) at 65,702; *National Fin. Adjusters*, 1985-2 Trade Cas. (CCH) at 64,248; *Yoder Bros.*, 1989-2 Trade Cas. (CCH) at 61,795.

69. *Yoder Bros.*, 1989-2 Trade Cas. (CCH) at 61,795 (quoting *United States v. Shubert*, 305 F. Supp. 1288, 1292 (S.D.N.Y. 1969)) (citation omitted).

70. See, e.g., *National Fin. Adjusters*, 1985-2 Trade Cas. (CCH) at 64,248; *Yoder Bros.*, 1989-2 Trade Cas. (CCH) at 61,795.

71. *Swift*, 1975-1 Trade Cas. (CCH) ¶ 60,201. For a description of the *Swift* decree, see *supra* note 9.

72. *Id.* at 65,702-03.

73. *Id.*

est, an agreed modification that 'enjoy[s] a solid presumption that it was founded in fact and supported by reason.'"⁷⁴ The *Swift* court felt that the "procedure," at a minimum, should include notice and a requirement that the parties substantiate their support for the proposed modifications.⁷⁵ The *Swift* court also required district courts to "consider the merits of any claim of bad faith or malfeasance on the part of the Government."⁷⁶

With the exception of the AT&T decree court, the 1975 *Swift* case represents the most expansive role a district court has assumed in a proceeding involving an uncontested modification. The 1975 *Swift* court, however, still recognized that district courts must accord some deference to government determinations since "a consent decree is a contract between the government and the defendants"⁷⁷ and "the court's time, talents, and resources are severely limited."⁷⁸ The court approved the proposed modifications.⁷⁹

While many district courts are not willing to extend the APPA to consent decree modifications, they follow the Second Circuit's suggestion in *Ameri-*

74. *Id.* at 65,703 (quoting *United States v. Swift & Co.*, 189 F. Supp. 885, 906 (N.D. Ill. 1960)) (alteration in original). The meat-packers consent decree is a useful vessel for analyzing the courts' role in modifying consent decrees. The decree was entered in 1920. *See supra* note 9. In 1928, two meat-packing corporations that were parties to the decree sought to have the decree vacated on procedural grounds. *Swift & Co. v. United States*, 276 U.S. 311 (1928). Justice Brandeis, writing for the Court, denied the petitioners' motion. *Id.* at 332. The meat-packers sought to modify the decree again four years later. *United States v. Swift & Co.*, 286 U.S. 106 (1932). The Court again denied the meat-packers' request. *Id.* at 119-20. In 1960, the United States District Court for the Northern District of Illinois considered a unilateral request by the defendants that all the prohibitions in the decree be lifted. *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960). Since the government opposed the modification, the court properly applied the *Swift* standard established by Justice Cardozo in the 1932 *Swift* case and denied the defendants' request. *Id.* at 913.

In 1971, the same district court approved an uncontested modification that permitted the defendants to engage in non-retail operations in the food market. *United States v. Swift & Co.*, 1971 Trade Cas. (CCH) ¶ 73,760 (N.D. Ill. 1971). The 1975 *Swift* case involved another uncontested modification that permitted the defendants to engage in retail operations in numerous non-food markets, such as cigars, china, and brick. *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201 (N.D. Ill. 1975). After considering the parties' supporting information and the general public's comments, the court approved the modification. *Id.* at 65,706. In 1980, the court considered the last proposed modification to the decree. In that case, the court approved uncontested modifications that provided for termination of the decree at a later date and, in the interim, lifted the restrictions against the meat-packers' involvement in the transportation and distribution of products. *United States v. Swift & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,185 (N.D. Ill. 1980). Finally, in 1981, the meat-packers decree was vacated. *United States v. Swift & Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,464 (N.D. Ill. 1981).

75. *Swift*, 1975-1 Trade Cas. (CCH) at 65,703.

76. *Id.*

77. *Id.* at 65,702.

78. *Id.* (quoting *United States v. CIBA Corp.*, 1970 Trade Cas. (CCH) ¶ 73,319, at 89,262 (S.D.N.Y. 1970)).

79. *Id.* at 65,706.

can *Cyanamid* and look to the APPA for guidance. Courts also demonstrate a significant amount of deference to the government and its determinations regarding the public interest. Regardless of the stringency of review imposed on the parties and their proposed modifications, courts consistently grant the motions to modify. As one commentator noted, "[w]here the parties have agreed to modification, judicial approval tends to be *pro forma*."⁸⁰

C. *The AT&T Decree Court's Approach to Consent Decree Modification and the D.C. Circuit's Response*

The AT&T decree court is a glaring exception to the trend among district courts to grant uncontested modifications to consent decrees.⁸¹ The government suit that gave rise to the 1982 consent decree was initiated in 1974. The government alleged that AT&T had violated section 2 of the Sherman Act⁸² by monopolizing "a broad variety of telecommunications services and equipment."⁸³ To break AT&T's monopoly control of the telecommunications industry, the government sought, and the court ultimately decreed, divestiture of AT&T's ownership and control of its twenty-two operating

80. Kelly, *supra* note 9, at 304 n.71. A *pro forma* decision is defined as a decision which "was rendered . . . merely to facilitate further proceedings." BLACK'S LAW DICTIONARY 1212 (6th ed. 1990).

Another commentator stated that "[i]n consented-to cases, the courts have been fairly deferential to the parties. In most cases, the court will follow the Justice Department's lead and modify a decree in accordance with the Department's wishes." Anderson, *supra* note 9, at 135 n.8. In addition, one commentator noted that "[t]he courts usually have approved such consented-to changes with only perfunctory statements." Edwin M. Zimmerman, *The Antitrust Division's Decree Review and Private Litigation Programs*, 51 ANTITRUST L.J. 105, 113 (1982).

81. See *supra* notes 68-80 and accompanying text.

82. 15 U.S.C. § 2 (1988) (prohibiting monopolies, and attempts to monopolize, that restrain trade); see also *supra* note 1.

83. *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131, 139 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). In particular, the government alleged that AT&T's monopoly control of the local telephone network through its 22 Bell Operating Companies (BOCs) enabled AT&T to discriminate against competitors in two distinct ways. First, AT&T was discriminating against competing long distance service providers. *Id.* at 161. To provide long distance telephone service between two points, a carrier must interconnect with the local telephone network at each point. Allegedly AT&T would not permit competing long distance providers to interconnect with the local telephone networks which were owned by AT&T's BOCs. *Id.* at 161-62. As a result, competitors effectively were frozen out of the long distance service market. *Id.* at 162.

Second, AT&T's control of the local telephone network enabled it to discriminate against competing telecommunications equipment manufacturers. *Id.* The government claimed the BOCs were compelled to purchase their equipment from AT&T's equipment subsidiary, Western Electric, "even though other equipment manufacturers produced better products or products of identical quality at lower prices." *Id.* at 163. Consequently, competing manufacturers were never able to gain a foothold in the manufacturing market. *Id.* at 162-63.

companies known as Bell Operating Companies (BOCs).⁸⁴ In turn, the BOCs, which inherited sole ownership and control of the local telephone network, were prohibited from offering long distance service,⁸⁵ manufacturing telecommunications equipment,⁸⁶ and providing information services.⁸⁷ The court reasoned that "[p]articipation in these fields carries with it a substantial risk that the Operating Companies will use the same anticompetitive

84. *Id.* at 165-66, 170-74, 178 n.199. The full text of the consent decree is appended to the *AT&T* opinion. *Id.* at 226-34. The 1982 consent decree is commonly referred to as the Modification of Final Judgment (MFJ) because it technically supplanted the 1956 consent decree. *Id.* at 141 & n.31.

The MFJ imposed various obligations on both AT&T and the BOCs. In particular, section I of the MFJ reorganized AT&T, mainly through divestiture of AT&T's ownership and control of the BOCs. *Id.* at 226-27. Once separated from AT&T, the BOCs were integrated into seven regional companies to act as holding companies for the respective operating companies. *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C.), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). The seven Regional Bell Operating Companies (RBOCs), commonly referred to as the "Baby Bells," are Ameritech, Bell Atlantic, BellSouth, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, and US West, Inc. Each RBOC is comprised of one or more BOCs. For example, C&P Telephone (a BOC) is a subsidiary of Bell Atlantic (an RBOC).

Section II(D) contains the "line[s] of business" restrictions. *AT&T*, 552 F. Supp. at 227-28. Specifically, the decree prohibited the RBOCs from entering into the markets for long distance service, equipment manufacturing and information services. *Id.* Section VII of the decree contains boilerplate language to ensure that the district court will continue to exercise jurisdiction over the enforcement and modification of the decree. *Id.* at 231. The court authored and submitted section VIII of the decree to the parties as a condition for entering the decree. *Id.* at 225; *see also United States v. Western Elec. Co.*, 673 F. Supp. 525, 532, 533 n.24 (D.D.C. 1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990). Section VIII establishes the standard of review for modification proceedings in which one of the parties to the MFJ contests the modification. *Western Elec.*, 900 F.2d at 295.

85. For a discussion of the reasons behind the long distance service restriction in the MFJ, *see AT&T*, 552 F. Supp. at 188-89. Note that the terms "long distance services" and "interexchange services" are synonymous. *Western Elec.*, 673 F. Supp. at 541 ("interexchange service may be equated with long distance service").

86. For a discussion of the reasons for the manufacturing restriction in the MFJ, *see AT&T*, 552 F. Supp. at 190-91.

87. Information services is "an umbrella description of a variety of services including electronic publishing and other enhanced uses of telecommunications." *Id.* at 189. Though the information services industry was in its infancy in 1982, the AT&T decree court reasoned that since "[a]ll information services are provided directly via the telecommunications network," the BOCs would "have the same incentives and the same ability to discriminate against competing information service providers that they would have with respect to competing interexchange carriers." *Id.* Thus, the consent decree prohibited the BOCs from providing information services. For a discussion of the reasons for the information services restriction in the MFJ, *see id.* at 189-90.

techniques used by AT&T in order to thwart the growth of their own competitors."⁸⁸

The AT&T decree court recognized that the parties⁸⁹ to the decree might seek to remove the lines of business restrictions contained in section II(D) of the Modification of Final Judgment (MFJ),⁹⁰ which prohibits the Regional Bell Operating Companies (RBOCs), the holding companies for the BOCs,⁹¹ from entering into the markets for long distance service, equipment manufacturing, and information services. To accommodate the parties, the court agreed to establish a triennial review procedure, whereby the government "report[s] to the [c]ourt every three years concerning the continuing need for the restrictions imposed by the decree."⁹² The AT&T decree court concluded that in determining whether to remove an MFJ restriction, it would apply the same standard as when it initially imposed the restriction: "a restriction will be removed upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power [over the local telephone network] to impede competition in the relevant market."⁹³

At the first triennial review, the RBOCs petitioned the court to remove all three of the MFJ's restrictions.⁹⁴ The government supported lifting the restrictions for information services and manufacturing⁹⁵ but not the long distance service restriction.⁹⁶ AT&T, one of the three parties to the MFJ,⁹⁷ opposed lifting the long distance service and manufacturing restrictions but

88. *Id.* at 224; see also *Western Elec.*, 673 F. Supp. at 532 (stating that the "line of business restrictions, embodied in section II(D) of the decree, were the necessary counterpart to the divestiture itself").

89. In most cases, the parties to a consent decree are the government and defendant(s) named in the government's original complaint. The MFJ, however, is different. While the government and AT&T are clearly recognized as parties to the decree, the divestiture of AT&T pursuant to the MFJ means that the BOCs are a third party to the MFJ, having received their autonomy from the decree. The AT&T decree court recognizes this distinction. *United States v. Western Elec. Co.*, 767 F. Supp. 308, 311 n.5 (D.D.C. 1991).

90. See *supra* note 84.

91. See *supra* note 84.

92. *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131, 195 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

93. *Id.* This is the same standard found in section VIII(C) of the MFJ. *Id.* at 231.

94. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 528 (D.D.C. 1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990). Two of the seven RBOCs, Ameritech and Bell Atlantic, actually petitioned for less than absolute removal of the long distance service restriction. *Id.* at 544 n.84.

95. *Id.* at 552-67.

96. *Id.* at 540-52. The government opposed lifting the long distance service restriction because local government regulations permitting only one local telephone service provider remained in place in most parts of the country. *United States v. Western Elec. Co.*, 900 F.2d 283, 292 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

97. See *supra* note 89.

did not oppose lifting the information services restriction.⁹⁸ Thus, for purposes of analyzing the proper standard of review in considering the proposed modifications to the MFJ, the court had before it one uncontested modification for information services and two contested modifications for long distance service and manufacturing.

The AT&T decree court did not address the distinction between contested and uncontested modifications prior to rejecting them.⁹⁹ Instead, the court applied the rigorous section VIII(C) standard to all three petitions to modify the MFJ,¹⁰⁰ requiring a showing that " 'there is no *substantial possibility* that [an Operating Company] could use its monopoly power to impede competition in the market it seeks to enter.' " ¹⁰¹ The court denied the petitions because it concluded that the RBOCs "would have the same incentives as well as the same means for discrimination, manipulation, and cross-subsidization that the Bell System possessed before the break-up." ¹⁰²

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the portion of the district court's opinion that preserved the MFJ restrictions on long distance service and manufacturing.¹⁰³ The D.C. Circuit, however, reversed and remanded the district court's decision to preserve the information services restriction.¹⁰⁴ The D.C. Circuit seized on the distinction between uncontested and contested modifications to existing decrees, and argued that the district court incorrectly applied the section VIII(C) standard for reviewing uncontested modifications to consent decrees.¹⁰⁵ According to the court, both the text of the decree and accompanying statements indicated that the parties intended section VII to apply to

98. It is important to note that AT&T *did not* support the removal of the information services restriction. Rather, they chose not to oppose lifting this restriction. *Western Elec.*, 673 F. Supp. at 534 n.33.

99. The court did note in its opinion that one of the RBOCs, BellSouth, argued that since the three parties to the decree agreed to removing the information services restriction, the court should approve the parties request. *Id.* at 534. The court considered BellSouth's argument a "curious observation," *id.*, and "frivolous." *Id.* at 535.

100. *Id.* at 532-40.

101. *Id.* at 532 (emphasis added) (quoting *United States v. American Tel. & Tel. Co.* (AT&T), 552 F. Supp. 131, 231 (D.D.C. 1982), *aff'd sub. nom.* *Maryland v. United States*, 460 U.S. 1001 (1983)).

102. *Id.* at 602.

103. *United States v. Western Elec. Co.*, 900 F.2d 283, 300-01, 301-05 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

104. *Id.* at 305-09.

105. "The trial court expressly noted that the standard in section VIII(C) would supplant '[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*' " *Id.* at 306 (alterations in original) (quoting *AT&T*, 552 F. Supp. at 195 n. 266).

uncontested modifications.¹⁰⁶ Consequently, unopposed petitions to modify a consent decree "should be approved so long as the modifications satisfy the 'public interest' standard embodied in the Tunney Act."¹⁰⁷

According to the D.C. Circuit, the "public interest test" arising out of the Tunney Act requires district courts to approve uncontested modifications "so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*."¹⁰⁸ The D.C. Circuit's "zone of settlements" standard means the court is obligated to approve the uncontested modification unless the district court is *certain*¹⁰⁹ that the proposed modification would "impede competition."¹¹⁰ In other words, unopposed modifications that are not certain to impede competition are believed to be within the "zone of settlements."¹¹¹ On remand,¹¹² the AT&T decree court concluded it could not determine with certainty that lifting the information services restriction would impede competition or "have the effect of

106. *Id.* Section VII of the MFJ is boilerplate language contained in most consent decrees that provides for the district courts' retention of jurisdiction over the administration and modification of consent decrees. Specifically, section VII states that "[j]urisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment . . . to apply to this Court . . . for the modification of any of the provisions." *AT&T*, 552 F. Supp. at 231.

Section VIII(C) of the MFJ sets a more rigorous standard for removal of section II(D)'s restrictions because it requires the "petitioning BOC" to demonstrate to the court that "there is no substantial possibility" that its market power will impede competition in the market that the BOC proposes to enter. *Id.* at 231. Thus, while section VII only requires that the court find that the proposed modification satisfies the Tunney Act's public interest requirement, section VIII(C) requires the BOC to conclusively demonstrate not only that the modification is in the public interest, but also that it will not result in less competition.

107. *Western Elec.*, 900 F.2d at 295.

108. *Id.* at 307.

109. Under the D.C. Circuit's standard, the requirement of "certainty" in determining whether the proposed modification is in the public interest is crucial. The district courts should view the proposed modifications through the limited prism of antitrust law and *not* be concerned with whether they evince the appropriate public policy. Consequently, proposed modifications that may not be the optimal policy but are consistent with antitrust law are not open to judicial scrutiny. *See infra* notes 205-26 and accompanying text.

110. The D.C. Circuit defines "impeding competition" as "hav[ing] the ability to raise prices or restrict output in the market [the BOC] seeks to enter." *Western Elec.*, 900 F.2d at 296.

111. *Id.* at 307.

112. Since the D.C. Circuit could *not* conclude that Judge Greene's refusal to lift the information services restriction was "not infected by the court's legal error concerning the proper standard of review," *id.* at 308, the court reversed that portion of the district court's decision and remanded the case for further proceedings. *Id.* at 309.

raising price [sic] or restricting output in that market."¹¹³ Thus, the court removed the restriction, "albeit with considerable reluctance."¹¹⁴

D. The Roots of Judicial Deference in Uncontested Modification Proceedings

In defining the standard for uncontested modifications, the D.C. Circuit equated it with the public interest test used for consideration of proposed consent decrees.¹¹⁵ Most district courts have exercised significant deference towards the government during settlement proceedings given that "[t]he Attorney General is the representative of the public interest in antitrust cases brought by the government."¹¹⁶

The extent of judicial deference at settlement proceedings was much stronger prior to enactment of the Tunney Act. In *Sam Fox Publishing Co. v. United States*,¹¹⁷ for example, the Supreme Court established that the judiciary should avoid second guessing the "wisdom" of government decisions to negotiate and enter into consent decrees, "at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting."¹¹⁸

113. *United States v. Western Elec. Co.*, 767 F. Supp. 308, 330 (D.D.C. 1991).

114. *Id.* at 327. The AT&T decree court was reluctant to lift the information services restriction because it believed that given that the BOCs possess the incentive and the ability to discriminate against their competitors, they should be excluded from the information services market. *Id.* at 330. Nevertheless, the court was not prepared to conclude *with certainty* that the removal of the restriction would impede competition and, therefore, granted the modification. *Id.* at 332.

Out of concern that it possibly misinterpreted the D.C. Circuit's remand opinion, the AT&T decree court imposed a stay on its decision to lift the information services restriction to allow interested parties to appeal the decision to the D.C. Circuit. *Id.* at 332-33. The D.C. Circuit later lifted the stay, stating that imposition of the stay was "an abuse of discretion" because nothing in the record indicated that Judge Greene's decision to lift the restriction would be reversed. *United States v. Western Elec. Co.*, 1991-2 Trade Cas. (CCH) ¶ 69,610, at 66,711 (D.C. Cir. 1991) (*per curiam*). On appeal, the Supreme Court denied a motion to reimpose the stay. *American Newspaper Publishers Ass'n v. United States*, 112 S. Ct. 366 (1991).

115. *See supra* note 107 and accompanying text.

116. *Control Data Corp. v. International Business Mach. Corp.*, 306 F. Supp. 839, 845 (D. Minn. 1969).

117. 366 U.S. 683 (1961).

118. *Id.* at 689. *Sam Fox* involved a 1941 consent decree that, *inter alia*, governed the internal affairs of an organization of writers and publishers of musical compositions known as the American Society of Composers, Authors and Publishers (ASCAP). *Id.* at 685. Several of ASCAP's smaller publishers challenged a 1960 modification to the consent decree and sought the right to intervene separately. The Supreme Court upheld the district court's refusal to grant the right to intervene on the grounds that the smaller publishers were adequately represented by both the government and ASCAP. *Id.* at 695.

With regard to consent decrees, the Supreme Court traditionally recognized that the Department of Justice is entitled to a certain amount of deference in its determinations. In the

Following enactment of the APPA, the district courts retained the *Sam Fox* Court's *de minimis* standard of review while also recognizing that the Tunney Act imposes certain obligations on courts to reach independent evaluations. In *United States v. Gillette Co.*,¹¹⁹ Judge Aldrich of the United States District Court for the District of Massachusetts articulated a Tunney Act public interest standard that bridges the two competing concerns.¹²⁰ The *Gillette* court's standard, which is commonly cited in consent decree cases, is a precursor to the D.C. Circuit's "zone of settlements" standard in *Western Electric*.¹²¹ Specifically, the *Gillette* standard emphasizes that the parties, and not the court, are settling the case. Though some consent decrees may not represent the optimal settlement, the *Gillette* standard requires district courts only to ensure that the proposed settlement be "within the reaches of the public interest."¹²²

According to two antitrust experts, the *Gillette* standard is an accurate interpretation of the Tunney Act.¹²³ Post-APPA district courts rely significantly on the *Gillette* court's standard of review under the Tunney Act.¹²⁴

1928 *Swift* case, the meat-packers sought to vacate the decree, arguing, *inter alia*, that the Attorney General exceeded his authority in negotiating a decree that placed broad restrictions on the defendants. *Swift & Co. v. United States*, 276 U.S. 311, 331 (1928). The Court rejected the defendants' claim, stating that the Attorney General's "authority to make determinations includes the power to make erroneous decisions as well as correct ones." *Id.* at 332.

In reviewing proposed consent decrees prior to passage of the APPA, many district courts followed the Supreme Court's admonition. See *Control Data*, 306 F. Supp. at 845 (stating that "[t]he Attorney General is the representative of the public interest in antitrust cases brought by the government"); *United States v. Shubert*, 305 F. Supp. 1288, 1292 (S.D.N.Y. 1969) (arguing that the government, as opposed to the private litigant, is better equipped to serve the public interest since the private litigant is likely to confuse the public interest with his or her private interest); *United States v. CIBA Corp.*, 1970 Trade Cas. (CCH) ¶ 73,319, at 89,262 (S.D.N.Y. 1970) (recognizing that in considering proposed consent decrees, district courts "must proceed in some degree upon faith in the competence and integrity of government counsel").

119. 406 F. Supp. 713 (D. Mass. 1975).

120. *Id.* at 714-15.

121. See *supra* notes 104-11 and accompanying text.

122. *Gillette*, 406 F. Supp. at 716. The *Gillette* court ultimately approved a consent decree that required Gillette to divest its domestic ownership of Braun, a manufacturer of electric shavers, on the grounds that Gillette monopolized the dry shaving market. In approving the decree, Judge Aldrich borrowed the Supreme Court's *Sam Fox* language in concluding that "[w]ith regard to the government's good faith, I have not the slightest reason to suspect otherwise. Nor has there been any contrary suggestion as a result of the proceeding's statutory publicity." *Id.*

123. II AREEDA & TURNER, *supra* note 3, ¶ 330g.

124. See *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 42 (W.D. Mo. 1975) (arguing that "a court's power to do very much about the terms of a particular decree, even after it has given the decree maximum . . . judicial scrutiny, is a decidedly limited power"), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976); *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978) (stating that the court

The *Gillette* standard enables a district court judge to conclude that a proposed decree is rooted in the public interest, though it may not be "the best possible settlement that could have been obtained."¹²⁵ If the proposed decree is conceivably within the reaches of the public interest,¹²⁶ then, as the United States Court of Appeals for the Ninth Circuit argued, "[t]he balancing of competing social and political interests affected by a proposed anti-trust consent decree must be left . . . to the discretion of the Attorney General."¹²⁷

In effect, the *Gillette* and *Western Electric* standards recognize that a variety of public policy options lies within the parameters established by anti-trust law. Courts applying this type of standard consider public policy choices to be within the province of the government and not the courts.¹²⁸ The AT&T decree court, however, viewed its role as questioning the government's interpretations of not only antitrust law but also public policy

would "adhere[] to Judge Aldrich's sound advice"); *United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir.) (citing with approval *Gillette* and *National Broadcasting*), cert. denied, 454 U.S. 1083 (1981); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (establishing that "[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court . . . should . . . carefully consider the explanations of the government . . . to determine whether those explanations are reasonable under the circumstances"); *United States v. Agri-Mark, Inc.*, 512 F. Supp. 737, 739 (D. Vt. 1981) (stating that the district court's "function . . . is not to determine whether this is the best possible settlement that could have been obtained, but rather to determine whether the settlement achieved is within the reaches of the public interest"); *United States v. American Brands, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,275, at 69,617 (S.D.N.Y. 1983) (citing with approval *Bechtel* and *Agri-Mark*); *United States v. Columbia Artists Management, Inc.*, 662 F. Supp. 865, 869, 870 (S.D.N.Y. 1987) (reasoning that in terminating a consent decree, which "is the same standard that a district court applies in deciding whether to enter [a proposed decree.] . . . the Court recognizes that the Department of Justice has broad discretion in controlling government antitrust litigation").

125. *Agri-Mark*, 512 F. Supp. at 739.

126. *Gillette*, 406 F. Supp. at 716.

127. *Bechtel*, 648 F.2d at 666 (emphasis added). In *Bechtel*, the defendant was challenging the entry of a consent decree due to certain events that occurred *after* both parties consented to the decree. *Bechtel* argued, in part, that the district court had erred in its public interest determination by refusing to consider "contentions going to the merits of the underlying claims and defenses." *Id.* The United States Court of Appeals for the Ninth Circuit rejected *Bechtel's* claim, stating:

The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest."

Id. (quoting *Gillette*, 406 F. Supp. at 716). The Ninth Circuit later affirmed its interpretation of the court's public interest determination in *United States v. BNS, Inc.*, 858 F.2d 456, 462-63 (9th Cir. 1988).

128. *Associated Milk Producers*, 534 F.2d at 117 (stating that "[i]t is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest").

choices.¹²⁹ While interpreting antitrust law certainly is subject to *de novo* review by any court, public policy decisions are properly left to the discretion of the government.¹³⁰

II. THE AT&T DECREE COURT'S STANDARD OF REVIEW: CONSTITUTIONAL AND PRACTICAL CONCERNS

The AT&T decree court offers several reasons to justify its demanding standard of review.¹³¹ First, the 1974 suit was "not an ordinary antitrust case."¹³² The significance of the suit and the numerous parties that intervened during both the original settlement and the 1987 modification proceeding led the court to believe that it "would be derelict in its duty if it adopted a narrow approach to its public interest review responsibilities."¹³³ In addition, the court has argued on several occasions that since government suits against AT&T had "an unfortunate history,"¹³⁴ closer scrutiny is required than would be "in a more routine antitrust case."¹³⁵ The type of

129. In rejecting the idea that district courts should defer to the government's determinations, the AT&T decree court argued that "courts must [not] unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit." *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131, 151 (D.D.C. 1982) (emphasis added), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

130. *Bechtel*, 648 F.2d at 666.

131. In considering both the proposed decree and its subsequent modifications, the AT&T decree court has required the parties to show that "there is no substantial possibility that [the RBOCs] could use [their] monopoly power to impede competition." *AT&T*, 552 F. Supp. at 231; *United States v. Western Elec. Co.*, 673 F. Supp. 525, 532 (D.D.C. 1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

The court emphasizes the same concerns when addressing either the proposed decree in 1982 or subsequent modifications in 1987. *AT&T*, 552 F. Supp. at 135-40, 151-53, 216; *Western Elec.*, 673 F. Supp. at 529-32, 600-04. Though this Comment addresses proceedings involving uncontested modifications, it nonetheless will assume that the court's concerns raised in the 1982 proceeding apply to the 1987 modification proceeding and therefore will discuss those concerns in the context of analyzing proposed modifications.

132. *AT&T*, 552 F. Supp. at 151.

133. *Id.* at 152.

134. *Id.* The court was referring to the alleged improprieties that took place during the government's suit against AT&T that began in 1949 and concluded with the 1956 consent decree.

135. *Id.* at 153. At the triennial review, the AT&T decree court, referring to the government decision to settle the 1949 suit, stated that "[t]hat history must not be repeated. This Court cannot and will not lend its authority to so self-defeating an enterprise." *Western Elec.*, 673 F. Supp. at 602.

A third justification the court offered was that since it had heard approximately 90 percent of the parties' evidence, it was better equipped than most courts to evaluate the specifics and validity of the consent decree. *AT&T*, 552 F. Supp. at 152. In fact, while considering MFJ-related legislation, Congress has relied on the AT&T decree court's knowledge of and familiarity with the decree. Specifically, Senator Simon wrote Judge Greene soliciting his views re-

review exercised by the court raises important constitutional and practical concerns that highlight the need for a regular and uniform standard of review for uncontested modifications.

A. *The Sliding Scale Approach to Reviewing Uncontested Modifications*

The AT&T decree court's standard of review, in effect, would create a "sliding scale" for judicial review of both entry of and modifications to decrees.¹³⁶ Under a sliding scale approach, the level of judicial scrutiny presumably would increase with the more significant modification proposals. The sliding scale approach, however, has two problems.

First, the court's assertion that the significance of the case justifies strict scrutiny is not consistent with the legislative history of the APPA.¹³⁷ During Senate hearings on the APPA, the bill's sponsor explored whether "it might be advisable to introduce a trigger in the bill *so that its provisions . . . would be applicable only in important cases.*"¹³⁸ Congress ultimately rejected a trigger provision.¹³⁹ While the AT&T decree court is correct that Congress enacted the APPA to correct the problem of "judicial rubber stamping,"¹⁴⁰ Congress did not endorse a sliding scale-type model.

Second, the sliding scale approach suffers from ambiguity. If judicial scrutiny should increase with the significance of the proposed modification, district courts would be left to determine which modifications are "significant." As a result, a wide range of interpretations of "significant" modifications would surface. Congress indicated that making "significance" the touchstone in approving proposed consent decrees would present pro-

garding a Senate bill, S. 173, 102d Cong., 1st Sess. (1991), to relieve the BOCs from the MFJ's manufacturing restrictions. Letter from Paul Simon, U.S. Senator, U.S. Senate, to Harold H. Greene, U.S. District Court Judge, U.S. District Court for the District of Columbia (May 21, 1991) (on file with the *Catholic University Law Review*). Judge Greene responded by "calling [Senator Simon's] attention to pertinent parts of published opinions" by the AT&T decree court. Letter from Harold H. Greene, U.S. District Court Judge, U.S. District Court for the District of Columbia, to Paul Simon, U.S. Senator, U.S. Senate (May 29, 1991) (on file with the *Catholic University Law Review*).

136. *AT&T*, 552 F. Supp. at 231.

137. See generally HOUSE REPORT, *supra* note 3; SENATE REPORT, *supra* note 24.

138. *Senate Hearings*, *supra* note 37, at 6 (statement of Sen. Tunney) (emphasis added).

139. As one commentator has noted, "[t]he legislative history . . . reveals that Congress rejected several proposals that the APPA contain a trigger mechanism and thus apply only to 'important' cases." James C. Noonan, Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility With Executive Discretion*, 35 HASTINGS L.J. 133, 155 (1983).

140. HOUSE REPORT, *supra* note 3, at 8.

blems.¹⁴¹ Similar interpretative problems could arise in modification proceedings. While the parties to the decree might regard a modification as technical, the court, or even a third party, might interpret the modification as "significant" enough to warrant intense scrutiny and rejection by the court. Ultimately, ambiguity surrounding the sliding scale approach would conflict with Congress' intention to "regularize and make uniform" the consent decree process.¹⁴²

B. Defining Bad Faith

The AT&T decree court has frequently mentioned that government anti-trust suits against AT&T involve alleged improprieties.¹⁴³ Most pre-APPA and post-APPA district courts view their primary role in considering modifications to consent decrees as ensuring that the process is free of malfeasance and collusion.¹⁴⁴ In *Sam Fox Publishing Co. v. United States*,¹⁴⁵ a case which was decided prior to passage of the APPA, the Supreme Court directed district courts to limit their consideration of proposed consent decrees to "claim[s] of bad faith or malfeasance on the part of the Government."¹⁴⁶ In effect, the Tunney Act's concern that "antitrust violators . . . often bring significant pressure to bear on government"¹⁴⁷ codifies the duty the Supreme Court imposed on district courts in *Sam Fox*. Thus, the district courts' "public interest" determination,¹⁴⁸ at the very least, includes considering whether the government has acted in "bad faith."

The AT&T decree court concluded that the *AT&T* case's "unfortunate history" amounts to the type of bad faith and malfeasance the Tunney Act

141. During Senate hearings on the proposed legislation, Senator Tunney admitted that even if a "trigger" mechanism was included, he was unsure "how [Congress] would define an important case." *Senate Hearings*, *supra* note 37, at 6.

142. HOUSE REPORT, *supra* note 3, at 7.

143. At the settlement proceeding, the AT&T decree court decided that the parties' conduct did "not foster a sense of confidence that the assessment of the settlement and its implications may be left entirely to AT&T and the Department of Justice." *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131, 153 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). At the triennial review, the court expressed similar skepticism about the parties' intentions when it stated that it would avoid repeating the same mistakes made during the 1949 case, which led to the 1956 Western Electric consent decree. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 602 (D.D.C. 1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

144. Congress' concern with alleged improprieties involving the entry of several consent decrees was the motivating force in passing the Tunney Act. See *supra* notes 25-37 and accompanying text.

145. 366 U.S. 683 (1961).

146. *Id.* at 689.

147. SENATE REPORT, *supra* note 24, at 5.

148. 15 U.S.C. § 16(e)-(f) (1988).

cautions against.¹⁴⁹ The court was referring to the circumstances surrounding the government's 1949 case against AT&T.¹⁵⁰ However, while correctly noting that "identical parties," i.e., the government and AT&T, were involved in both 1949 and 1982, the court unfairly assumed that improprieties that were committed in one case must have been committed again thirty-three years later. At a minimum, the turnover in personnel, both in the Antitrust Division and at AT&T, over the course of thirty-three years¹⁵¹ should create a presumption that the parties did not engage in the same collusive behavior.

Aside from the alleged improprieties dating back to the 1949 case, the AT&T decree court implied that the parties to the 1982 case engaged in improprieties of their own.¹⁵² The court faulted the government and AT&T for originally attempting to settle the case in the United States District Court for the District of New Jersey¹⁵³ since "that proposal might either have escaped Tunney Act review altogether or it might at best have been reviewed only to the extent agreeable to them."¹⁵⁴ While the court believed that this amounts to the type of "bad faith" that warrants increased judicial scrutiny of the consent decree and subsequent modifications, the parties' efforts were wholly consistent with statutory and case law.¹⁵⁵ At that time, the parties believed that since the settlement would be a modification to the 1956 consent decree, the Tunney Act did not apply.¹⁵⁶ If anything, the parties demonstrated their "good faith" when they stipulated to the AT&T decree court that they would comply with the spirit of the APPA though they believed it did not apply.¹⁵⁷

149. *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131, 152 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

150. *Id.* at 135-38.

151. Since 1949, the year the Department of Justice first sued AT&T, 19 persons have served as Attorney General. During the same period, 20 persons have served as Assistant Attorney General in charge of the Antitrust Division at the Department of Justice. In 1985, the Antitrust Division created the Communications and Finance Section, which, *inter alia*, is responsible for administering the AT&T consent decree. Three persons have headed the Communications and Finance Section since its establishment.

152. *AT&T*, 552 F. Supp. at 152-53.

153. *See supra* note 60.

154. *AT&T*, 552 F. Supp. at 152 n.91.

155. *See supra* notes 49-63 and accompanying text.

156. *See supra* note 60.

157. The court also made reference to "inappropriate collaboration" between the Department of Defense and AT&T that it believed resembled the collaboration between the same two entities that took place during the 1949 case. *AT&T*, 552 F. Supp. at 153.

A second indication of the government's "good faith" can be inferred from the court's insistence that the proposed decree be modified to *remove* two restrictions that had been imposed on BOCs. Specifically, the proposed decree would have prohibited BOCs from marketing customer premises equipment, such as telephones, and producing directory advertising manuals,

Thus, although the court implied that the government's conduct since 1982 amounts to the bad faith that the *Sam Fox* Court and Congress cautioned against, the implication is unrealistic. The court's response to the government's conduct suggests that it believed the government was more guilty of incompetence than of bad faith or malfeasance.¹⁵⁸ In particular, the court stated that "[t]hese circumstances do not foster a *sense of confidence* that the assessment of the settlement and its implications may be left entirely to AT&T and the Department of Justice."¹⁵⁹ The court's private opinion regarding the parties' degree of precision should not supersede its obligation to grant uncontested modifications that serve the public interest.¹⁶⁰

C. Constitutional and Practical Concerns Arising Out of the AT&T Decree Court's Standard of Review

The AT&T decree court's unwillingness to defer to the government's public interest determinations raises two specific concerns, one constitutional and the other practical. In the absence of procedural and substantive uniformity in reviewing uncontested modifications, these concerns may ultimately jeopardize the usefulness of consent decrees. Such a result would be contrary to the express policy goals of Congress.¹⁶¹

commonly known as Yellow Pages. *Id.* at 191-94. The AT&T decree court concluded that BOCs would not "be able to use their monopoly position to disadvantage competitors" and required the parties to remove the two restrictions as a condition for entering the decree. *Id.* at 224.

Thus, while the court is concerned that the parties may have engaged in collusive activities, thereby implying that the government may have negotiated far less relief than would have been obtained at trial, the court's requirement that the proposed decree be modified to *remove* restrictions suggests that the court was concerned that the government had negotiated *too much* relief. See Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153, 160 n.49 (1983). The court's action belies its concern that the Department of Justice and AT&T colluded to evade judicial relief for the corporation. The court's required modifications suggest the opposite: the government independently crafted a solution that the court believed was excessive.

158. "Bad faith" is defined as "[t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud." BLACK'S LAW DICTIONARY 139 (6th ed. 1990). "Malfeasance" is defined as "[e]vil doing; ill conduct. The commission of some act which is positively unlawful." *Id.* at 956.

159. *AT&T*, 552 F. Supp. at 153 (emphasis added).

160. One commentator argued that AT&T's correspondence with the Department of Defense in the 1974 case and the parties' decision to settle the case in New Jersey "provide no compelling analytical justification for the creation of the formidable review test formulated by the *AT&T* court." Noonan, *supra* note 139, at 155.

161. HOUSE REPORT, *supra* note 3, at 6; SENATE REPORT, *supra* note 24, at 5-6.

1. Separation of Powers Considerations

In *Maryland v. United States*,¹⁶² the Supreme Court summarily affirmed the AT&T decree court's entry of the settlement.¹⁶³ The case consolidated four appeals challenging various substantive aspects of the decree.¹⁶⁴ Contrary to some assertions,¹⁶⁵ however, the appeals did not challenge the constitutionality of either the APPA itself or the AT&T decree court's standard of review under the APPA. Public officials¹⁶⁶ and private commentators¹⁶⁷ alike have argued that a district court's public interest determination under the APPA presents possible separation of powers problems.

In *Green v. Frazier*,¹⁶⁸ the Supreme Court established that "courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the . . . other departments of government."¹⁶⁹ With regard to judicial approval of consent decrees and subsequent modifica-

162. 460 U.S. 1001 (1983).

163. *Id.* The Court heard the case on direct appeal from the district court pursuant to the Expediting Act. *Id.* at 1002. Under the Expediting Act, parties may appeal the entry of a consent decree directly to the Supreme Court upon certification by the district court. 15 U.S.C. § 29(b) (1988).

164. In *Maryland v. United States*, No. 82-952, and *Illinois v. United States*, No. 82-1001, several states challenged the federal government's authority to preempt state regulation pursuant to the decree. *Maryland*, 460 U.S. at 1002 (Rehnquist, J., dissenting). In *Tandy Corp. v. United States*, No. 82-953, the Tandy Corporation challenged the decree's elimination of "a requirement that Western Electric license its patents for a reasonable royalty to anyone who applies." *Id.* (Rehnquist, J., dissenting). Finally, in *North Am. Tel. Assn. v. United States*, No. 82-992, an organization of telecommunications manufacturers objected to the MFJ provision allowing BOCs to market customer premises equipment. *Id.* at 1003 (Rehnquist, J., dissenting).

165. See Note, *supra* note 157, at 168 n.98 (arguing that the Supreme Court's summary affirmance of *AT&T* demonstrates the constitutionality of the APPA's public interest provision).

166. In his additional views to the House Report accompanying the APPA, Representative Hutchinson wrote that "[i]f it is assumed that it is necessary for someone to review the Department's exercise of prosecutorial discretion to determine whether it is in the public interest, it does not follow that the federal courts, limited by the Constitution to deciding judicial questions, are the appropriate reviewing agencies." HOUSE REPORT, *supra* note 3, at 22; see also *Maryland*, 460 U.S. at 1001-06 (Rehnquist, J., dissenting).

167. In 1983, the Deputy Assistant Attorney General for the Department of Justice Antitrust Division during the *AT&T* litigation voiced his concern that "in some particulars, the judgments that were reached may have gone beyond at least the traditional understanding of the public interest standard, in ways that may even begin to call into play separation of powers principles." Ronald G. Carr, *Some Observations on the Tunney Act*, 52 ANTITRUST L.J. 953, 961 (1983). Despite his concerns with Judge Greene's exacting review, Mr. Carr believes that the court "ably conducted" the Tunney Act proceedings. *Id.*; see also Noonan, *supra* note 139, at 157 n.179; Anderson, *supra* note 9, at 149-50.

168. 253 U.S. 233 (1920).

169. *Id.* at 240.

tions,¹⁷⁰ the *Green* standard *does not* require district courts to blindly approve proposed modifications. Proposed modifications are similar to proposed decrees and thus represent “judicial acts”¹⁷¹ subject to approval of district courts. The *Green* separation of powers standard, however, limits courts to determining whether the proposed modification is consistent with existing antitrust laws; policy decisions reside within another branch of the government.

The AT&T decree court’s rigorous standard of review of the uncontested modification amounts to the type of encroachment that the *Green* Court cautioned against.¹⁷² The court used the same standard in reviewing the proposed modifications that it used in considering the proposed decree.¹⁷³ In his dissent to the *Maryland* Court’s summary affirmance, Justice Rehnquist argued that the AT&T decree court’s standard of review fails to “admit[] of resolution by a court exercising the judicial power established by Art[icle] III of the Constitution.”¹⁷⁴ Given that district courts operate without statutory authority in modification proceedings,¹⁷⁵ Justice Rehnquist’s concerns are directly applicable to such proceedings. The decision to enter into a de-

170. Arguably, the *Maryland* Court may have chosen not to invalidate the judiciary’s public interest determination under the APPA because the statute mandates such a determination. See 15 U.S.C. § 16(b)-(h) (1988). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson wrote in his concurring opinion that the executive branch’s authority is at its “maximum” when it operates pursuant to a legislative mandate. *Id.* at 635-37 (Jackson, J., concurring). By analogy, the judiciary’s authority is perhaps at its “maximum” when it operates pursuant to a legislative mandate. Thus, given that district courts’ public interest determinations during settlement proceedings are made pursuant to the Tunney Act, their findings may withstand a constitutional challenge. District courts’ findings during modification proceedings, however, are arguably less supportable because the APPA does not apply. See *supra* notes 49-54 and accompanying text.

171. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

172. In reversing the AT&T decree court’s decision not to lift the information services restriction, the D.C. Circuit did not address the separation of powers issue. Instead, the appeals court limited its reversal to the issue of the appropriate standard of review. *United States v. Western Elec. Co.*, 900 F.2d 283, 293 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

173. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 532-36, 600-02 (D.D.C. 1987), *aff’d in part and rev’d in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

174. *Maryland v. United States*, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting). In addition to his concerns with the AT&T court’s stringent standard, Justice Rehnquist argued that a district court’s public interest determination under the APPA, regardless of how deferential that determination may be, “is a classic example of a question committed to the Executive,” *id.* at 1005 (Rehnquist, J., dissenting), in this case the Department of Justice. Thus, the possibility exists that should the APPA be challenged as facially unconstitutional, the Supreme Court could strike it down. Justice Rehnquist was joined by Chief Justice Burger and Justice White in his *Maryland* dissent. *Id.* at 1001.

175. See *supra* notes 49-54 and accompanying text.

cree entails a policy decision over "whether the benefits that might be obtained in a lawsuit are worth the risks and costs."¹⁷⁶ Similarly, the decision to modify a decree is a policy decision that entitles the government to judicial deference.

2. *Practical Considerations: Preserving Consent Decrees as an Alternative to Litigation*

The second concern with the AT&T decree court's lack of deference towards the Department of Justice is a practical one: it jeopardizes the attractiveness of settlement by consent decree for both the government and defendants.¹⁷⁷ Both the government and defendants may be disinclined to craft consent decrees if they believe that the public interest determinations made by the government will be replaced by those of district courts. However, in passing the Tunney Act, Congress endorsed the opposite result: to "preserve the consent decree as a viable settlement option."¹⁷⁸ District courts have been cognizant of Congressional intent to preserve consent decrees as a viable alternative to litigation.¹⁷⁹

When the APPA was enacted, one commentator cautioned that Congress, in passing the APPA, had "established an elaborate procedure which will prove counterproductive and may, indeed, undermine effective enforcement of our antitrust laws."¹⁸⁰ Those concerns have not been borne out¹⁸¹ be-

176. *Maryland*, 460 U.S. at 1006 (Rehnquist, J., dissenting).

177. The AT&T decree court's active supervision of the approval and subsequent administration of the decree has led one commentator to conclude that the court's standard "injects a substantial degree of uncertainty into the consent decree process" since "[t]he distinct possibility that any terms agreed to by the parties might be altered by the reviewing court could place a significant strain on the negotiations." Noonan, *supra* note 139, at 156.

178. SENATE REPORT, *supra* note 24, at 6. In its report, the House stated that the Tunney Act was intended to preserve the overall goal of the consent decree program: encourage settlement of antitrust suits. HOUSE REPORT, *supra* note 3, at 6.

179. "[T]he court is adjured to adopt 'the least complicated and least time-consuming means possible.'" *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) (quoting SENATE REPORT, *supra* note 24, at 6); see also *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (stressing that "[m]ore elaborate requirements [than those established by the *Gillette* court] might undermine the effectiveness of antitrust enforcement by consent decree"), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (stating that "[i]t was the intention of Congress in enacting APPA to preserve consent decrees as a viable enforcement option in antitrust cases").

180. Milton Handler, *Antitrust—Myth and Reality in an Inflationary Era*, 50 N.Y.U. L. REV. 211, 243 (1975).

181. McDavid et al., *supra* note 31, at 915 (concluding that "[t]here is little evidence that Tunney Act procedures have been abused or have imposed undue burdens on the parties").

cause district courts have taken a restrictive view of their role,¹⁸² particularly in cases involving uncontested modifications to consent decrees.¹⁸³ The D.C. Circuit reinforced that consensus in its remand of the AT&T decree court's opinion.¹⁸⁴ The D.C. Circuit emphasized that the government's public interest determinations are entitled to some deference.¹⁸⁵ In reversing the district court's denial of the uncontested modification, the D.C. Circuit argued that "it is to be expected that the district court would seriously consider the Department [of Justice's] economic analysis and predictions of market behavior"¹⁸⁶ given the Department's "comparative advantage" in assessing the state of competition in the relevant market.¹⁸⁷

Prior to being reversed by the D.C. Circuit, the AT&T decree court viewed the APPA as an absolute rejection of the *Sam Fox* standard,¹⁸⁸ which would mean that district courts should accord the Department of Jus-

182. In one case, the district court implied that the APPA provides courts with a limited function in approving consent decrees. The court stated that:

if the Congress wants the judicial branch to have more power than that implicit in a threat of total rejection of a proposed decree, *such power must be authorized by legislation which is considerably broader in scope than that vested by the newly enacted Antitrust Procedures and Penalties Act or by existing law.*

United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 42 (W.D. Mo. 1975) (emphasis added), *aff'd*, 534 F.2d 113 (8th Cir. 1976).

183. See *supra* notes 68-70 and accompanying text.

184. *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990). The D.C. Circuit in *Western Electric* discussed the judicial deference issue in the context of defining the proper standard of review under section VIII(C) of the MFJ, which, according to the D.C. Circuit, is the equivalent of the *Swift* standard for *contested* modifications to the MFJ. *Id.* at 295. Given that the section VII standard, which the D.C. Circuit argued is to be used for *uncontested* modifications, is much less stringent, one can reasonably infer that district courts are expected to defer to the Department of Justice when using this standard.

On remand, the AT&T decree court appeared to draw this inference in deciding to lift the information services restriction pursuant to the D.C. Circuit's standard of review. The district court stated that "this Court is required to defer to the Department of Justice on the issue of whether the proposed modification of the decree is in the public interest as that term is used in the Tunney Act." *United States v. Western Elec. Co.*, 767 F. Supp. 308, 329 (D.D.C. 1991).

185. *Western Elec.*, 900 F.2d at 297-98.

186. *Id.* at 297.

187. *Id.* at 298.

188. "Congress rejected case law to the effect that courts should not 'assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree.'" *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131, 149 n.74 (D.D.C. 1982) (alteration in original), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (quoting *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961)). *Contra United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,979-80 (W.D. Mo. 1977) (stating that "[t]he APPA did not change the pre-existing standards for determining whether entry of an antitrust consent decree is in the public interest" and that "[t]he APPA codifies the case law which established that the Department of Justice has a range of discretion in deciding the terms upon which an antitrust case will be settled").

tice a minimal amount of deference.¹⁸⁹ Instead, the AT&T decree court argued that the heightened standard of review required by the APPA is based on "the line of cases in which courts examined proposed consent decrees to determine whether they were in the public interest."¹⁹⁰

In terms of prior case law, however, Congress indicated¹⁹¹ that it was endorsing the approach taken by the Supreme Court in *United States v. Armour & Co.*,¹⁹² where the Supreme Court emphasized that consent decrees should be viewed as "a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation."¹⁹³

189. Compare Note, *supra* note 157, at 165-70 (arguing that a district court applying the APPA would be abdicating its responsibility if it relied on the *Sam Fox* standard) and Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163, 206-10 (arguing that the APPA requires district courts to abandon the pre-APPA standard of judicial deference) with Noonan, *supra* note 139, at 151 n.143 (asserting that "[w]hile the spirit of the APPA lends some credence to these arguments [that Congress endorsed a heightened standard of review], Congress explicitly directed the courts to adhere to pre-APPA precedent when defining the 'public interest'").

190. *AT&T*, 552 F. Supp. at 149 n.74. The court cited *United States v. Carter Prods., Inc.*, 211 F. Supp. 144 (S.D.N.Y. 1962), and *United States v. Ling-Temco-Vought (LTV), Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970), as "the line of cases" that Congress viewed as embodying the heightened public interest standard in the APPA. However, the court's conclusion is puzzling since the *Carter Products* and *LTV* courts demonstrated significantly more deference towards the government than the *AT&T* court did. In *Carter Products*, the court approved a consent decree between the government and Carter Products which broke Carter Products' control over the market for a widely distributed drug called meprobamate compound, the sole active ingredient in tranquilizing drugs. *Carter Products*, 211 F. Supp. at 146-49. The court, relying on the government's "weighty considerations," *id.* at 148, concluded that the proposed decree was in the public interest since the settlement afforded "substantially the same relief that could be obtained after a hearing upon the merits" and also preserved a third party's right to litigate the validity of the decree. *Id.*

In *LTV*, the government and LTV entered into a consent decree which required LTV to divest its ownership of Jones & Laughlin Steel Corporation (J&L). *LTV*, 315 F. Supp. at 1302-08. The court had received letters during settlement proceedings "expressing deep concern" over the impact the decree would have on pension and employee plans then operated by J&L. *Id.* at 1309. As a condition for entering the decree, the court instructed the parties to include in the decree a provision to safeguard J&L's existing pension and employee plans. *Id.* at 1310. Though *LTV* is commonly cited as a case demonstrating heightened judicial scrutiny, the court emphasized that it was deferring to the parties determinations, "particularly the assurance of the Department of Justice." *Id.* at 1309 (emphasis added).

191. HOUSE REPORT, *supra* note 3, at 8-9 (citing *United States v. Armour & Co.*, 402 U.S. 673 (1971)).

192. 402 U.S. 673 (1971).

193. *Id.* at 681; accord *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (arguing that "[t]he Court must also give appropriate recognition . . . to the fact that every consent judgment normally embodies a compromise"). But see McDavida et al., *supra* note 31, at 891-95. The authors argue that the court's public interest determination under the APPA is based on cases where courts engaged in a

The element of "compromise" stressed by the Supreme Court in *Armour* is codified in the APPA.¹⁹⁴ While consent decrees are "judicial acts" that require a court's approval, they also represent a contractual settlement between two parties. District courts that substitute their own views on appropriate public policy run the risk of upsetting that settlement. The Supreme Court, in *Armour*, and Congress, in passing the APPA, have encouraged courts in reviewing proposed decrees to recognize that decrees embody a settlement between two parties. District courts considering proposed decrees have heeded the encouragement by deferring to the parties' decisions to enter into consent decrees.¹⁹⁵ Likewise, in uncontested modification proceedings, courts have demonstrated the same type of deference.¹⁹⁶ Though the *Armour* Court's and Congress' admonitions apply specifically to proposed decrees, the courts have recognized that proposed modifications represent a refinement of the prior settlement.

III. A PROPOSED STANDARD OF REVIEW FOR UNCONTESTED MODIFICATIONS

Because neither Congress nor the Supreme Court has addressed the issue of uncontested modifications,¹⁹⁷ the district courts need guidance as to the proper standard of review for such cases. Although only one district court, the AT&T decree court, has denied an uncontested modification, the issue should still be addressed. Other district courts in the future will be confronted with the issue.

thorough public interest inquiry. They also argue that "Judge Greene's inquiry into the AT&T decree was no more rigorous than that conducted by the courts in some cases prior to enactment of the Tunney Act. AT&T is simply the most recent, best-publicized consent decree proceeding." *Id.* at 894.

194. To preserve the spirit of compromise, Congress urged the district courts in reviewing proposed consent decrees to "adduce the necessary information through the least complicated and least time-consuming means possible." SENATE REPORT, *supra* note 24, at 6. Congress seemed to be echoing the *Armour* Court's observation that district courts should recognize that the proposed consent decree is a form of settlement, whereby both parties are foregoing the possibility that "they might have won had they proceeded with the litigation." *Armour*, 402 U.S. at 681.

195. See *supra* notes 116-30 and accompanying text.

196. See *supra* notes 68-70 and accompanying text.

197. In 1982, Congress considered, but failed to enact, legislation to extend the Tunney Act to both modification and dismissal proceedings. See H.R. 6361, 97th Cong., 2d Sess. (1982); see also *The Tunney Act: Oversight Hearing Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

Many district courts¹⁹⁸ have relied on the Tunney Act for guidance in uncontested modifications.¹⁹⁹ The courts' reliance is logical since proceedings involving uncontested modifications are practically identical to proceedings involving proposed consent decrees: both parties are in agreement and seek the court's approval.²⁰⁰ Thus, the concerns that Congress expressed in passing the Tunney Act apply to uncontested modifications. Congress was concerned that judicial "rubber stamping"²⁰¹ would result in consent decrees that were not in the public interest.²⁰²

Congress' response to these problems was "to regularize and make uniform judicial and public procedures that depend upon the Justice Department's decision to enter into a proposal for a consent decree."²⁰³ The same type of procedural and substantive regularity and uniformity would be advantageous in uncontested modification proceedings. Thus, in the absence of a legislative mandate from Congress, the courts should apply a "zone of settlements" standard that borrows significantly from the APPA procedural and substantive requirements currently being applied by many district courts in reviewing proposed decrees.²⁰⁴

*A. Zone of Settlements Procedural and Substantive Requirements:
Differentiating Between Legal Interpretations and Policy
Decisions*

In considering uncontested proposals to modify an existing consent decree, district courts should adopt the procedures of the Tunney Act.²⁰⁵ A competitive impact statement, similar to that required by section 1(a) of the Tunney Act,²⁰⁶ would require the Department of Justice to explain its consent to a proposed modification, thereby aiding the court in making its deter-

198. See *supra* notes 55-67 and accompanying text.

199. In fact, the United States Court of Appeals for the Second Circuit suggested that district courts rely on the Tunney Act when considering modifications to existing consent decrees. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 n.7 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

200. Aside from having to apply the *Swift* standard in contested modifications, the court also will have the benefit of controversy between the parties to assist the court in its determination. Therefore, the differences in opinion presented to the court obviate the need for APPA-type procedures.

201. HOUSE REPORT, *supra* note 3, at 8.

202. See generally *House Hearings, supra* note 35, at 35-37 (statement of Rep. Rodino); *Senate Hearings, supra* note 37, at 2-4 (statement of Sen. Tunney).

203. HOUSE REPORT, *supra* note 3, at 7.

204. See *supra* notes 55-67 and accompanying text.

205. See 15 U.S.C. § 16(b)-(d) (1988).

206. *Id.* § 16(b).

mination. In addition, the APPA's notice and comment requirements²⁰⁷ serve as sufficient notice to third parties who may contest the modifications. Though many uncontested modifications are technical, asking the parties to comply would not act as a disincentive.²⁰⁸ Instead, technical modifications would require less of the court's time and resources in making its determinations.²⁰⁹

Just as parties should procedurally comply with the Tunney Act, the court also should comply with the statute's substantive requirements. In particular, the court's standard of review for uncontested modifications should be the same as for proposed consent decrees.²¹⁰ The public interest standard in the Tunney Act does not entitle the district court "to substitute its judgment about the advisability of settlement by consent judgment in lieu of trial."²¹¹ Rather, the district court should review the modification in terms of whether it "is within the reaches of the public interest."²¹²

207. *Id.* § 16(c), (d).

208. A former attorney in the Department of Justice's Antitrust Division during the *AT&T* case stated that:

With respect to modifications, the Department's point is a narrow one, and concerns not principle, but practicality. There is no possible objection to the requirement that the Department explain the reasons for its proposal. In moving the court for modification, the Department invariably does, and must do, exactly that. There is no objection to the defendant having to expose its contacts with the government.

Carr, *supra* note 167, at 954.

209. In fact, asking the parties to comply would act as an effective means of "smoking out" possible bad faith or malfeasance. If the parties decline to comply, then the court could infer that the parties are possibly withholding information that would be pertinent to making a public interest determination. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

210. "[U]ncontested motions for modification . . . should be approved so long as the modifications satisfy the 'public interest' standard embodied in the Tunney Act." *United States v. Western Elec. Co.*, 900 F.2d 283, 295 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

211. *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,979 (W.D. Mo. 1977); *accord* *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (reasoning that "[t]he court is required to determine not whether a particular decree is the one that will best serve society"), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Agri-Mark, Inc.*, 512 F. Supp. 737, 739 (D. Vt. 1981) (stating that the court's "function [in approving consent decrees] is not to determine whether this is the best possible settlement"); *United States v. American Brands, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,275, at 69,617 (S.D.N.Y. 1983) (determining that "[t]he court's function in making a public interest determination under the APPA is not to determine whether [the proposed settlement] is the best possible settlement"); *United States v. Columbia Artists Management, Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987) (stating that in terminating a consent decree, which involves the same standard of review in approving a consent decree, the court "may not substitute its opinion or views concerning . . . the determination of appropriate injunctive relief for the settlement of [antitrust] cases'") (quoting *Mid-America Dairymen*, 1977-1 Trade Cas. (CCH) at 71,980).

212. *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975); *accord* *Bechtel*, 648 F.2d at 666 (arguing that "[t]he court is required to determine . . . whether the settlement is 'within the reaches of the public interest'") (quoting *Gillette*, 406 F. Supp. at 716); *United*

Therefore, in uncontested modification proceedings, the government's decision to enter into a modification of the decree should carry the presumption that the modification is in the public interest. Since the Tunney Act did not overrule traditional judicial deference towards the government's decisions to enter into consent decrees,²¹³ the same type of deference should apply to uncontested modification proceedings.

The court may rebut the presumption in two ways. First, the court can rely on the traditional *Sam Fox* standard and reject a proposed modification if the proposal is the product of bad faith or malfeasance.²¹⁴ Second, the court can reject the proposed modification if it determines that the modification is outside the parameters of conceivable public policy decisions.²¹⁵ This is equivalent to the D.C. Circuit's "zone of settlements" standard²¹⁶ and the *Gillette* court's standard that the proposed decree be "within the reaches of the public interest."²¹⁷ Under this standard, the district court is not permitted to substitute its own view as to the most appropriate settlement. Rather, the government's proposal amounts to a legitimate policy decision and *not* a breach of existing antitrust law, the court is obligated to accept that proposal. In doing so, the district court avoids possible separation of powers concerns and best preserves the viability of the consent decree process.

B. Usefulness of the Zone of Settlements Standard

The "zone of settlements" standard is appropriate for several reasons. First, it provides the procedural uniformity necessary to ensure that consent decrees are in the public interest.²¹⁸ Second, its substantive requirements significantly reduce the possibility of constitutional challenges. Unlike court determinations in settlement proceedings, the court's public interest assessments in uncontested modification proceedings are *not* made pursuant to a statute.²¹⁹ Thus, the court's standard of review should be confined to a conventional, Article III public interest determination.²²⁰ This prevents the possibility that the court's determination would be deemed unconstitu-

States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978) (agreeing with the standard articulated by the *Gillette* court).

213. See *supra* notes 180-96 and accompanying text.

214. See *supra* notes 143-60 and accompanying text.

215. See *supra* notes 119-30 and accompanying text.

216. United States v. Western Elec. Co., 900 F.2d 283, 307 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990).

217. United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975).

218. See HOUSE REPORT, *supra* note 3, at 6; SENATE REPORT, *supra* note 24, at 5.

219. See *supra* notes 49-54 and accompanying text; see also *supra* note 170.

220. See *supra* notes 68-80 and accompanying text; see also Maryland v. United States, 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting).

tional.²²¹ Moreover, the "zone of settlements" standard provides more resolution than the AT&T decree court's more stringent standard because it recognizes that a district court cannot replace the government's policy decisions with its own preferred solution.

Third, the "zone of settlements" standard preserves the government's ability to make policy decisions as it sees fit. The AT&T decree court noted at the triennial review that, over the course of five years, the government reversed its position²²² on the lines of business restrictions even though "no significant changes" had occurred in those markets to warrant the government's policy reversal.²²³ However, the Tunney Act's (and the "zone of settlement's") public interest standard does not forbid policy reversals.²²⁴ The standard only requires that the government's decisions be conceivably rooted in the public interest.²²⁵ If district courts substitute their own judg-

221. *Green v. Frazier*, 253 U.S. 233, 240 (1920) (establishing that "questions of policy" are not to be decided by the judiciary).

222. At the time the decree was entered in 1982, the Department of Justice had recommended that BOCs be prohibited from entering the long distance, manufacturing, and information services markets. *United States v. American Tel. & Tel. Co. (AT&T)*, 552 F. Supp. 131, 186-191 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). At the triennial review in 1987, the government recommended that the MFJ restrictions on BOCs entering the manufacturing and information services markets be lifted. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 552-67 (D.D.C. 1987), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir.) (per curiam), *cert. denied*, 111 S. Ct. 283 (1990). As for the long distance restriction, the government originally supported lifting it but then decided to oppose lifting the restriction. *Id.* at 540-52; *see also supra* note 96.

223. *Western Elec.*, 673 F. Supp. at 602.

224. In a 1989 interview, Judge Greene indicated he was dissatisfied with the government's policy reversal. He stated:

[A]ntitrust decrees are not written, unlike leases for apartments, on a month-to-month basis. They are written for a long, long time, typically, particularly a big decree like this. And then to come along and say, a couple of years later, "Oops, we made a mistake; let's forget about it," it's obviously a change in policy. Now what brought it about and who brought it about, I don't know. But I'm hopeful that we'll get back on a more even keel now.

Margaret E. Kriz, *Ringling the Bells*, 21 NAT'L J. 272, 274 (1989).

225. While the AT&T decree court viewed the government's policy reversal as contrary to the public interest, it is consistent with the trend in Congress towards lifting the MFJ restrictions. In a recent article covering legislative proposals to lift the MFJ's manufacturing and information services restrictions, a reporter wrote:

Key lawmakers . . . are growing increasingly nervous about keeping the seven largest and most sophisticated communications companies out of manufacturing and information services — a situation, they are told, that could stymie the development of technology already available in other nations, and thus hurt U.S. industrial competitiveness.

This rising concern over the United States' declining share of international trade has only intensified a long-held feeling among some in Congress and the executive branch that [Judge] Greene has assumed too much power over the telecommunica-

ments, then they jeopardize the consent decree process. In passing the APPA, Congress emphasized that the law was *not* intended to make settlement by consent decree a less attractive alternative. To the contrary, Congress insisted that the courts "must preserve the consent decree as a viable settlement option."²²⁶

IV. CONCLUSION

Though the APPA's procedural and substantive standards apply only when district courts review proposed decrees, they have proven to be useful guidance for court's reviewing uncontested modifications to existing consent decrees. In general, courts have afforded the government wide latitude in making public interest determinations. If the government's assessment of the proposed modification falls within the broad parameters of legitimate public policy options, courts have deferred to those determinations and, therefore, granted the motions to modify the decree. The AT&T decree court is a notable exception. That court established a rigorous standard of review that jeopardizes the viability of the consent decree process and is pos-

tions industry. They say his decisions have affected not only antitrust policy but have implications for telecommunications policy as well.

Alyson Pytte, *'Baby Bell' Regulators Struggle for Power*, 47 CONG. Q. 2209, 2209 (1989).

Beginning in 1986, Congress has considered various legislative proposals that would permit the BOCs to engage in operations that the MFJ currently prohibits. See S. 2565, 99th Cong., 2d Sess. (1986) (proposing the transfer of the MFJ from the United States District Court for the District of Columbia to the Federal Communications Commission); H.R. 2030, 100th Cong., 1st Sess. (1987) (proposing that the BOCs be permitted to manufacture telecommunications equipment and to provide information services); H.R. 2140, 101st Cong., 2d Sess. (1989) (proposing that the BOCs be permitted to manufacture both telecommunications and customer premises equipment and to provide information services); S. 173, 102d Cong., 1st Sess. (1991) (proposing that the BOCs be permitted to manufacture telecommunications equipment); H.R. 1523, 102d Cong., 1st Sess. (1991) (proposing that the BOCs be permitted to manufacture telecommunications equipment); H.R. 1527, 102d Cong., 1st Sess. (1991) (proposing that the BOCs be permitted to manufacture telecommunications equipment); H.R. 3515, 102d Cong., 1st Sess. (1991) (proposing that the BOCs, currently allowed to offer information services, provide such services, subject to certain regulatory safeguards). *But see* H.R. 5096, 102d Cong., 2d Sess. (1992) (proposing that the MFJ's lines of business restrictions be codified).

Both the House and the Senate also have considered several resolutions expressing the "sense" of each body regarding the need to remove the MFJ's lines of business restrictions. See H.R. Con. Res. 339, 100th Cong., 2d Sess. (1988) (proposing that the House adopt the position that the BOCs should be permitted to manufacture telecommunications and customer premises equipment and to provide information services); S. Con. Res. 161, 100th Cong., 2d Sess. (1988) (proposing that Congress determine whether BOCs should be permitted to manufacture telecommunications and customer premises equipment and to provide information services); S. Con. Res. 34, 101st Cong., 1st Sess. (1989) (proposing that Congress confirm that it is the legislature's responsibility to establish national telecommunications policy).

226. SENATE REPORT, *supra* note 24, at 6.

sibly unconstitutional. A “zone of settlements” standard, which borrows many of the APPA’s procedural and substantive elements, would provide the courts with uniformity and regularity that is both constitutional and practical.

Justin Weaver Lilley

